U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 22 2009

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner develops technology for the defense marketplace. It seeks to employ the beneficiary permanently in the United States as a Vice President, Finance, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education necessary for classification as a member of the professions holding an advanced degree. Specifically, the director determined that the beneficiary did not possess at least a U.S. baccalaureate or foreign equivalent degree. The director also considered the petition under the exceptional ability classification also set forth at section 203(b)(2) of the Act and determined that the position did not require an alien of exceptional ability.

On appeal, counsel asserts that the petition is both approvable under the advanced degree professional classification and the exceptional ability classification. Counsel submits a brief and additional evidence.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

The beneficiary possesses a foreign three-year bachelor's degree from the University of Calcutta and is a fellow of the Institute of Chartered Accountants of India (ICAI) and the Institute of Cost and Works Accountants of India (ICWAI). Thus, the first issue is whether any of these credentials is a foreign degree equivalent to a U.S. baccalaureate degree. If not, we will then examine whether the petition is approvable under the exceptional ability classification.

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The petitioner initially submitted an evaluation of the beneficiary's credentials from [redacted] of the Trustforte Corporation. [redacted] concludes that the beneficiary's three-year baccalaureate is equivalent to three years of post-secondary education towards a baccalaureate in the United States. [redacted] then notes that the petitioner was admitted as a fellow to the ICAI, which is based on the completion of bachelor-level studies in accounting, the passage of exams and the fulfillment of supervised professional experience. [redacted] concludes that the combination of the beneficiary's three-year baccalaureate and fellowship with ICAI is equivalent to a baccalaureate in Accounting and licensure as a Certified Public Accountant.

On motion, the petitioner submitted new evaluations of the beneficiary's credentials. [redacted] Professor of Marketing at Pace University, and [redacted], a finance professor at Hofstra University, conclude that the beneficiary's ICAI fellowship is equivalent to a U.S. baccalaureate. [redacted] explains that ICAI coordinates practical training and holds qualifying examinations and includes "a complete advanced post-secondary program of academic study comprised of advanced bachelor's level classes and examinations in the field of Accounting." Dr. Spieler asserts that the ICAI "is comparable to one or two years of advanced bachelor's-level academic study, comprising classes and examinations in subjects" related to accounting and business.

On appeal, counsel asserts that the director unfairly diminished the value of the evaluations submitted and that the beneficiary's bachelor's degree equivalency is not based on the combination of unrelated credentials but a membership that builds upon the three-year degree. Counsel relies on minutes from a liaison meeting between the Nebraska Service Center and the American Immigration Lawyers Association (AILA). While these minutes discuss the combination of postsecondary education with a three-year baccalaureate, as acknowledged by counsel, they do not address ICAI membership. The petitioner submits materials from the ICAI's website indicating that it enrolls "students" in its "Chartered Accountancy course." The materials also indicate that the ICAI has a "Board of Studies" tasked with imparting education to the students through distance education and has a four-year curriculum for high school graduates. Finally, the petitioner submitted ICAI course materials.

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[1] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent *degree*." (Emphasis added.) For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent *degree*." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). (Emphasis added.)

While ICAI may offer courses and examinations, there is no evidence that ICAI is a college or university or that membership is a "degree." *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *11 (D. Ore. Nov. 30, 2006) (finding USCIS was justified in concluding that ICAI membership was not a college or university "degree" for purposes of classification as a member of the professions holding an advanced degree).

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[1] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree" from a college or university the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

In the alternative, the petitioner seeks to classify the beneficiary as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

As stated above, the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered."

The director did not contest that that the beneficiary qualifies as an alien of exceptional ability. We acknowledge that the beneficiary has more than ten years of experience as a financial manager, is a fellow of both ICAI and ICWAI and in 2006 received remuneration well beyond the prevailing wage. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(B),(C) and (D). The director, however, concluded that the job requirements certified by DOL did not reflect that the job requires an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification,** Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**

(Bold emphasis added.) Thus, if the job requirements on the ETA Form 9089 do not demonstrate that the job requires an alien of exceptional ability, the petition may not be approved in that classification.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) lists the following criteria, at least three of which must be met for eligibility as an alien of exceptional ability. Thus, a job that requires an individual of exceptional ability must require at least three of the following:

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

Counsel asserts that any degree can serve to meet this criterion, including an Associate's degree. Section 203(b)(2)(C) of the Act, however, provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the degree required is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the occupation of financial management, the occupation title identified on the ETA Form 9089, Part F, line 3.

The ETA Form 9089, Part H, lines 4, 8 and 9, indicate that the job requires a U.S. baccalaureate or foreign educational equivalent. The Occupational Outlook Handbook (OOH), prepared by the Department of Labor and available online at http://www.bls.gov/oco/ocos001.htm#training (accessed March 12, 2009 and incorporated into the record of proceedings), provides:

> ***Education and training.*** Most accountant and auditor positions require at least a bachelor's degree in accounting or a related field. Beginning accounting and auditing positions in the Federal Government, for example, usually require 4 years of college (including 24 semester hours in accounting or auditing) or an equivalent combination of education and experience. Some employers prefer applicants with a master's degree in accounting, or with a master's degree in business administration with a concentration in accounting. Some universities and colleges are now offering programs to prepare students to work in growing specialty professions such as internal auditing. Many professional associations offer continuing professional education courses, conferences, and seminars.

As a bachelor's degree is required for most accounting positions, the petitioner has not established that a U.S. baccalaureate or foreign educational equivalent is indicative of a degree of expertise significantly above that ordinarily encountered in the field. Thus, this job requirement cannot serve as evidence that the job requires an alien of exceptional ability.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The occupation title for the position is listed on Part F, line 3 as "Financial Managers." The petitioner indicated on the ETA Form 9089, Part H, lines 6 and 10, that the job requires 96 months (eight years) of experience in the job offered or an alternate occupation, including "Vice President-Finance; Chief Financial Officer; Controller; or any Finan [sic]." Thus, the job does not require 10 years of full-time experience "in the occupation."

On appeal, counsel asserts that because the director did not consider the beneficiary's education to constitute a bachelor's "degree," the job actually requires an additional two years of experience

because Part H, line 14 permits "any suitable combination of education, training or experience." At issue are the minimum job requirements. As the minimum job requirements certified by DOL are a bachelor's degree plus eight years of experience, the job does not *require* 10 years of experience in the occupation of financial management. Specifically, ICAI fellowship is not required. Moreover, the record does not demonstrate that ICAI fellowship requires two years of full-time employment in financial management. Rather, the ICAI materials provided on appeal reference practical training in accounting.

In light of the above, the job does not require 10 years of experience in the occupation of financial management.

A license to practice the profession or certification for a particular profession or occupation

Section 203(b)(2)(C) of the Act provides that the possession of a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the licensure requirement is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The petitioner indicated on the ETA Form 9089, Part H, line 14 that the job requires "[p]rofessional accounting qualification or foreign equivalent." Counsel asserts that this sentence reveals that the job requires a Certified Public Accountant (CPA) or foreign equivalent such as ICAI membership. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

Nevertheless, according to the OOH, http://www.bls.gov/oco/ocos001.htm#training, any accountant filing a report with the Securities and Exchange Commission (SEC) is required by law to be a CPA. The petitioner indicated on the ETA Form 9089, Part H, line 14, that the job required experience preparing SEC periodic reports for public companies. Thus, we are persuaded that the job requires a CPA or foreign equivalent, which is indicative of a degree of expertise significantly above that encountered in the field.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The Level IV prevailing wage for the occupation, as certified on the ETA Form 9089, Part F, line 5, is only $115,794. The proffered wage listed on the ETA Form 9089, Part G, is $165,000 to $250,000. The petitioner was already paying the beneficiary more than $174,000 in 2006. Thus, we are persuaded that the wages offered are indicative of a job that requires an individual of exceptional ability.

Evidence of membership in professional associations

We have already considered the licensure requirement above. No additional membership requirements appear on the ETA Form 9089.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The record does not indicate that the job requires formal recognition for achievements and significant contributions to the industry or field.

In light of the above, while the job requires a license and offers a high remuneration, the job does not require at least three of the factors identified as criteria for aliens of exceptional ability. As the petitioner has not demonstrated that the job requires an individual of exceptional ability as defined at 8 C.F.R. §§ 204.5(k)(2), (3)(ii), the petition is not approvable under that classification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. **The petitioner has not met that burden.**

ORDER: The appeal is dismissed.